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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

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11 MARK ANTHONY LANDAVERDE,
12 Plaintiff,
13 v.
14 NANCY A. BERRYHILL, Deputy
15 Commissioner of Social Security,
16 Defendant.

Case No. CV 15-7886-RAO

CORRECTED ORDER GRANTING
COUNSEL'S MOTION FOR
ATTORNEY FEES UNDER 42
U.S.C. § 406(b)¹

17 Before the Court are Plaintiff Mark Anthony Landaverde's ("Plaintiff")
18 counsel's ("Counsel")'s Motion for Attorney Fees Pursuant to 42 U.S.C. § 406(b)
19 ("Motion") and Nancy A. Berryhill's ("Commissioner") Notice of Non-Opposition
20 ("Comm'r Response"). (*See* Dkt. Nos. 32, 33.)

21 For the reasons stated below, the Court **GRANTS** Counsel's Motion.

22 **I. BACKGROUND**

23 On October 7, 2015, Plaintiff filed a complaint in this Court challenging the
24 Commissioner's decision to deny his application for social security disability and
25 disability insurance benefits and supplemental security income. On August 25,

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28 ¹ The Court issues this Corrected Order to cure errors in the Court's earlier Order issued on April
9, 2018.

1 2016, the Court entered judgment reversing the decision of the Commissioner and
2 remanding the matter. Thereafter, based on the parties' joint stipulation, the Court
3 ordered payment of \$6,150.00 in Equal Access to Justice Act ("EAJA") fees to
4 Counsel. On remand, the Administrative Law Judge granted Plaintiff's application
5 for benefits. In a Notice of Award dated January 17, 2018, the agency informed
6 Plaintiff that his past-due benefits totaled \$55,302.00 for March 2011 through
7 December 2016. (Mot., Ex. A at 1.) The agency also informed Plaintiff that 25-
8 percent of Plaintiff's past-due benefits, amounting to \$18,111.00, had been
9 withheld to pay his counsel's fees. (*Id.* at 3.) In two separate Notices of Award
10 dated March 22, 2018, each regarding auxiliary benefits for Plaintiff's wife and
11 child, the agency informed Plaintiff and other individuals that those benefits totaled
12 \$24,444.00 in the aggregate. (*Id.* at 8, 12.) In the same Notices of Award, the
13 agency also stated that it had withheld a total of \$6,111.00 to pay Plaintiff's
14 Counsel's fees. (*Id.*)

15 Counsel brings this Motion pursuant to 42 U.S.C. § 406(b) requesting
16 \$24,222.00 for attorney fees. In the Motion, Counsel states that the amount
17 awarded should be reduced by \$6,150.00, the amount already awarded to Counsel
18 under EAJA. (Mot. at 4.) The Commissioner does not oppose Counsel's request.

19 **II. DISCUSSION**

20 **A. 42 U.S.C. §406(b) Fees**

21 An attorney who represents a Social Security benefits claimant in court may
22 be awarded "a reasonable fee ... not in excess of 25 percent of the total of the past-
23 due benefits" awarded to the claimant, payable "out of, and not in addition to, the
24 amount of such past-due benefits." 42 U.S.C. § 406(b)(1)(A). Attorneys may not
25 obtain additional fees based on a claimant's continuing entitlement to benefits. *Id.*

26 In *Crawford v. Astrue*, the Ninth Circuit addressed the calculation of attorney
27 fees, stating that "[a] district court charged with determining a reasonable fee award
28 under § 406(b) must respect ... 'lawful attorney-client fee agreements ... looking

1 first to the contingent-fee agreement, then testing it for reasonableness.”” 586 F.3d
2 1142, 1148 (9th Cir. 2009) (quoting *Gisbrecht v. Barnhart*, 535 U.S. 789, 122 S.
3 Ct. 1817, 152 L. Ed. 2d 996 (2002)). However, “the court may properly reduce the
4 fee for substandard performance, delay, or benefits that are not in proportion to the
5 time spent on the case.” *Crawford*, 586 F.3d at 1151.

6 In an exhibit attached to the Motion, Counsel provided a summary of hours
7 indicating that Counsel spent 35.2 hours on this matter before the Court. (Mot., Ex.
8 C.) Taking the award sought by Counsel in the Motion (\$24,222.00) and the
9 number of attorney hours spent working on the matter (35.2) yields an effective
10 billing rate of \$688.13.

11 The Commissioner does not oppose the fee request. (Dkt. No. 33.)

12 Several reasons indicate that Counsel’s request is reasonable.

13 First, the Court notes that Plaintiff agreed, in writing, to Counsel receiving 25
14 percent of past due benefits awarded, contingent, of course, upon a favorable
15 outcome.² (*See* Mot., Ex. B.) Plaintiff was ultimately awarded back payments as
16 well as auxiliary benefits. (*Id.*, Exs. 3, 4.) By contract, Counsel is entitled to 25-
17 percent of the amount of those back payments. *See Hopkins v. Cohen*, 390 U.S.
18 530, 88 S. Ct. 1146, 20 L. Ed. 2d 87 (1968).

19 Second, the Court recognizes that Counsel obtained a favorable result for
20 Plaintiff, *i.e.*, a remand to the Commissioner for further administrative proceedings,
21 and an ultimate award of retroactive benefits. (Mot., Ex. A.)

22 Third, the time Counsel expended here, 35.2 hours, falls within the generally
23 acceptable range. *Patterson v. Apfel*, 99 F. Supp. 2d 1212, 1214 n.2 (C.D. Cal.
24 2000) (collecting cases supporting a “twenty to forty hour benchmark” for social
25 security fee awards).

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27 ² In contracting with Plaintiff on a contingency basis, Counsel assumed the risk of
28 nonpayment, and would receive her 25 percent fee *only if* Plaintiff received benefits
by a decision of the Social Security Administration or by judgment of this Court.

1 Fourth, Counsel's \$688.13 effective hourly rate is not demonstrably
2 unreasonable. *See Wenzel v. Colvin*, EDCV 11-0338-JEM, 2014 WL 3810247
3 (C.D. Cal. Aug. 1, 2014) (approving 406(b) fees at \$1,000 hourly rate); *see also*
4 *Villa v. Astrue*, 2010 WL 118454, at *1-2 (E.D. Cal. Jan. 7, 2010) (approving
5 § 406(b) fees that exceeded \$1,000.00 per hour); *Ellick v. Barnhart*, 445 F. Supp.
6 2d 1166, 1169-71 (C.D. Cal. 2006) (conducting a review of cases approving awards
7 at rates of up to \$982.00 per hour).

8 Fifth, the Commissioner does not allege that Counsel was responsible for any
9 delays, or that the quality of representation was substandard. *See Gisbrecht*, 535
10 U.S. at 808 (holding that a reduction of fees may be appropriate if there were any
11 delays or if the representation was substandard).

12 Sixth, Plaintiff has been served with a copy of Counsel's Motion and had the
13 opportunity to oppose the Motion but chose not to do so. (Proof of Service, Dkt.
14 No. 34.)

15 In sum, based on the above, the Court finds that the requested fees are not so
16 large so as to represent a windfall for Counsel. Further, the Court finds no reason
17 to conclude that Counsel's fees are unreasonable.

18 **B. EAJA Fees**

19 An attorney must refund to the client EAJA fees received when the § 406(b)
20 award exceeds the EAJA fees. *Gisbrecht*, 535 U.S. at 796. Here, Counsel was
21 awarded \$6,150.00 in EAJA fees. *See* Dkt. No. 31. Accordingly, a refund of EAJA
22 fees is appropriate.

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III. CONCLUSION

Consistent with the foregoing, IT IS ORDERED that Counsel's motion for \$24,222.00 in attorney fees is GRANTED. IT IS FURTHER ORDERED that Counsel shall reimburse Plaintiff the amount of \$6,150.00 for EAJA fees previously paid by the Commissioner.

DATED: May 25, 2018

/s/

ROZELLA A. OLIVER
UNITED STATES MAGISTRATE JUDGE